

STATE OF WISCONSIN  
TAX APPEALS COMMISSION

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ELMAKIAS CONSTRUCTION INC.,  
YEHUDA ELMAKIAS,

DOCKET NO. 10-S-131  
DOCKET NO. 10-I-132

Petitioners,

vs.  
WISCONSIN DEPARTMENT OF REVENUE,

DECISION AND ORDER

Respondent.

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**THOMAS J. McADAMS, COMMISSIONER:**

This case comes before the Commission for decision after a 3-day trial. Each side filed submissions after the trial. The Petitioner is representing himself and the corporation. The Respondent in these matters, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Axel F. Candelaria. For the reasons discussed below, we have no choice but to find for the Respondent.

**FINDINGS OF FACT<sup>1</sup>**

**A. Jurisdictional Facts**

1. For calendar taxable years 2001 to 2006, the Department issued against Petitioner a Notice of Field Audit Action. The notice was dated June 24, 2008, and pertained to Petitioner's use tax assessment. Ex. 1.

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<sup>1</sup> The Commission requested that the parties file statements of proposed facts. Almost all of the facts in this decision come from the Department's submission. We have made edits for punctuation, form, and consistency.

2. Under letter dated August 15, 2008, the Department received Petitioner's Petition for Redetermination relative to the use tax assessment. Ex. 2.

3. Under notice dated March 18, 2010, the Department issued its Notice of Action denying Petitioner's Petition for Redetermination relative to the use tax assessment. Ex. 3.

4. On May 17, 2010, Petitioner filed a Petition for Review with the Commission relative to the use tax assessment. Petitioner argued conflict of interest, that many of the adjustments were proven to be factually incorrect, and that the audit was based off a compact disc ("CD"), not the actual paper records. Ex. 4.

5. For calendar taxable years 2002 to 2004, the Department issued against Petitioner a Notice of Field Audit Action. The notice was dated July 7, 2008, and pertained to Petitioner's income tax assessment. Ex. 5.

6. Under letter dated August 21, 2008, the Department received Petitioner's Petition for Redetermination relative to the income tax assessment. Ex. 6.

7. Under notice dated March 18, 2010, the Department issued its Notice of Action denying in part and granting in part Petitioner's Petition for Redetermination relative to the income tax assessment. Ex. 7.

8. On May 17, 2010, Petitioner filed a Petition for Review with the Commission relative to the income tax assessment. Petitioner argued conflict of interest, that many of the adjustments were proven to be factually incorrect, and that the audit was based off a CD, not the actual paper records. Ex. 8.

9. During its field audit, the Department adjusted 14 different items in the franchise tax return of Elmakias Construction, Inc., a tax-option corporation for state tax purposes. Exs. 14 and 49. Although Petitioner filed a Petition for Redetermination with respect to the franchise tax adjustments, Exs. 2 and 6, these adjustments were not appealed to the Commission.

### **B. Substantive Facts**

10. On February 7, 2012, Petitioners initially moved into evidence Exhibits A through O while the Department moved into evidence Exhibits 1 through 48.

11. Petitioners asserted during their opening statement that the Department manipulated the audit to produce a higher assessment and ignored material provided by the Petitioners. *See*, Audio CD: Elmakias Construction, Inc., Yehuda Elmakias, 10-S-131, 10-I-132 Hearing, held at Wisconsin Tax Appeals Commission, at 5:45 to 10:03 mins. (Feb. 7, Apr. 30 and Jun. 20, 2012) (on file with Commission, Petitioner, and Respondent).<sup>2</sup>

12. The Department, on the other hand, asserted during its opening statement that the case before the Commission was one of substantiation wherein the Petitioners had failed to provide to the Department enough substantiation to reverse the assessments down to \$0.00, which is what the Petitioners had requested from the Department. *Id.* The Department also apprised the Commission that the adjustments to the franchise tax return had not been appealed. *Id.*

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<sup>2</sup> This will be cited hereinafter as "Audio CD." The actual file name on CD is "Elmakias (#1) 2-7-12 - 10-S-131 & 10-I-132.

13. After one day of testimony by Petitioners, the case was adjourned in order to address whether the adjustments to the franchise tax returns were properly before the Commission and whether testimony about the franchise tax adjustments was relevant.

14. On April 2, 2012, the Commission ruled that testimony relating to the franchise tax adjustments was relevant and that it would allow Petitioners to put in such evidence. The Commission also ruled that Petitioner could not "appeal the franchise tax assessment as the statutory deadline for such an appeal has passed . . . [and that Petitioner could not] do anything in the context of this case to change the franchise tax matter." Ruling on Motion, p.1 (WTAC Apr. 2, 2012) ("Motion Ruling").

15. On April 30, 2012, during the second day of testimony by Petitioners, they introduced Exhibits S, T-1, T-2, U, V, W-1, W-2 and X. The Department objected to the introduction and receipt of these exhibits as they were in violation of the November 28, 2011, deadline per the Commission's Order of October 14, 2011. In light of April 2, 2012 ruling, the Department filed and moved into evidence amended Exhibit 14 to provide additional details about the franchise tax adjustments. At the end of the second day of testimony by Petitioners, they requested a copy of the Department's field audit workpapers. *See*, Audio CD, at 3:59:00 to 4:00:01 mins.<sup>3</sup>

16. Under Order dated May 14, 2012, the Commission ordered the exchange of a second set of exhibits. On June 20, 2012, the third day of testimony by Petitioners, they introduced Exhibits Y-1, Y-2, Y-3, Y-4, Z, AA, BB, CC, DD, EE, FF, HH,

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<sup>3</sup> The actual file name on CD is "Elmakias #3 PM - 4-30-12."

II and JJ. There was no Exhibit GG marked. The Department filed and moved into evidence Exhibit 49, the field audit workpapers, and Exhibit 50. Exhibit 50 documented that, based on the information Petitioners filed per the May 14, 2012, Order, the Petitioners were only able to substantiate \$123.80 of use tax for taxable calendar year 2002 and \$94.95 of use tax for taxable calendar year 2004.

17. Throughout the three days Petitioners provided testimony, the Commission repeatedly asked Petitioners to focus their presentation of their case. The Commission also repeatedly made the same requests in its orders throughout the case. At one point during the trial, the Commissioner took over the questioning and led the taxpayer through all of the dozen or so proposed adjustments the taxpayer had listed in his filing prior to the trial,<sup>4</sup> with mixed results.

### **BURDEN OF PROOF**

Assessments made by the Department are presumed to be correct, and the burden is upon the Petitioner to prove by clear and satisfactory evidence in what respects the Department erred in its determination. *Calaway v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-856 (WTAC 2005), citing *Puissant v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984).

Therefore, stated another way that seems relevant to this case, a taxpayer who sues the Department for a refund bears the burden of proving the invalidity of the

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<sup>4</sup> The Commission's standard pre-trial order requires the parties to file a list of proposed adjustments in order to focus the litigation and to save the parties' time and expense.

Department's determination. *MRC Industries, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 203-273 (WTAC 1991).

## DECISION

This case concerns the Petitioner's<sup>5</sup> attempt to challenge the Department's assessment of approximately \$144,000 against him and his construction business.<sup>6</sup> There was a trial in 2012 spread out over the better part of three full days. The testimony and the exhibits showed that the company was organized in 1999 and was primarily engaged in the construction business. The business activity consisted of building new homes and the remodeling of existing homes. The bottom line is that the Petitioner's effort to attack the assessments failed in at least two key respects, and therefore, the Department's assessments must stand.

First, the taxpayer clearly has the burden of proof in this type of litigation, but, instead of attempting to prove his numbers at trial by way of substantiation, the Petitioner chose merely to attack the Department's numbers and how the audit was conducted, and never got around to doing what he needed to do, i.e. introducing relevant documents and receipts and exhibits in an appropriate way. He essentially tried to do discovery during the trial, conducting his portion of the trial much like a lawyer might conduct a deposition of a hostile witness. While normally a

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<sup>5</sup> Although there are technically two Petitioners before the Commission on these cases, we will sometimes refer to them collectively as "the Petitioner" as, at all times, Mr. Elmakias represented both.

<sup>6</sup> The Notice of Action issued to Elmakias Construction is in the amount of \$20,472.59 for the period ending December 31, 2001 through December 31, 2006. The Notice of Action issued to Mr. Yehuda Elmakias is in the amount of \$124,375.99 for the period ending December 31, 2002 to December 31, 2004.

“substantiation case”<sup>7</sup> is no more than a half-day trial, here the trial lasted three full days, without perceptibly moving forward. The presiding Commissioner even took over the questioning<sup>8</sup> in the Petitioner’s case in an attempt to get the cases moving forward. Unfortunately, the results were mixed at best, and the Commission after 3 days of trial *sua sponte* ended the testimonial phase of the case, as to that point the Petitioner had produced no substantiation, and it seemed obvious none would be forthcoming for some time, if at all.<sup>9</sup> Simply put, the taxpayer has not met the burden of proof that is required here.<sup>10</sup> We have the Department’s assessments before us, and essentially nothing else.

Second, at some level, the Petitioner has repeatedly disregarded, ignored, or violated the Commission’s orders that were issued to bring this litigation to a just resolution, i.e. one that fairly and justly complies with our tax laws.<sup>11</sup> One specific example will suffice: In addition to the numerous demands for substantiation, at the

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<sup>7</sup> We should point out that most of the cases before the Commission are at some level “substantiation cases,” and we have hundreds of them each year.

<sup>8</sup> The Wisconsin Rules of Evidence allow the Commissioner to control the method and the mode of interrogation.

<sup>9</sup> At various points during the case, Mr. Elmakias explained that he had been involved in a week long civil case in Dane County (that apparently ended in his favor) and that he expected this case to go even longer. That experience seems to have clouded the taxpayer’s judgment here.

<sup>10</sup> We should point out that, although the taxpayer here is *pro se*, we explained to him on numerous occasions what was expected of him in this type of litigation. We had substantial personal contact with Mr. Elmakias both before the trial at teleconferences and certainly during the three-day trial. The taxpayer is clearly an intelligent, thoughtful, and even pleasant individual. His conduct of this litigation, therefore, is inexplicable, as he clearly had boxes of records that he wheeled in on a dolly each day of the trial. We certainly did our best to lead him to the water, we could not, however, in the end make him drink of it.

<sup>11</sup> The Commission’s file is replete with extensions and adjournments that the Commission granted to the Petitioner, some *sua sponte*.

conclusion of the third day of trial, the Commission issued a two-page long fill-in-the-blanks order in order to coax the appropriate information out of the Petitioner. Instead of filling in the appropriate numbers, however, the Petitioner turned in the order late and wrote in zeros in each and every blank on the two-page form.<sup>12</sup> The Commission's December 27, 2012 order, however, had stated as follows:

**The Petitioners are cautioned that the Commission expects strict compliance with this portion of the order and that a brief that does not comply will be stricken.**

(emphasis added)

The Petitioner has clearly violated this particular order, and perhaps several others.<sup>13</sup>

In sum, the Department's assessments here will be upheld as the Petitioners have not met the burden of proof and they have repeatedly violated Commission orders.

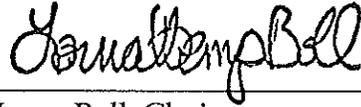
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<sup>12</sup> Violations of an order authorize the Commission to dismiss the actions. *See*, Wis. Stats. §§ 802.10(7) and 805.03. Further, under § 805.03, for failure of the Petitioner to prosecute ... or obey any order of the Commission, the Commission may dismiss the petition for review.

<sup>13</sup> The Department argues in its post-trial brief that the Petitioners' post-trial submission is a "document dump." In brief, the Petitioners' submission is approximately 3 inches thick, and appears to consist mostly of receipts that he has already submitted to the Department during the audit process. The submission is problematic for us in at least three ways. First, the briefing order required that the submission be "reasonably concise." This is not. Second, we are not auditors or accountants. The pile of documents, even when we wade through it, makes little or no sense to us without appropriate explanation. Third, we cannot make legal arguments on behalf of the Petitioners. The lack of an acceptable submission constitutes an additional basis for finding against the Petitioners here.

Dated at Madison, Wisconsin, this 7<sup>th</sup> day of June, 2013.

**WISCONSIN TAX APPEALS COMMISSION**



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Lorna Hemp Boll, Chair



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Roger W. LeGrand, Commissioner



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Thomas J. McAdams, Commissioner

**ATTACHMENT: NOTICE OF APPEAL INFORMATION**

WISCONSIN TAX APPEALS COMMISSION  
5005 University Avenue - Suite 110  
Madison, Wisconsin - 53705

**NOTICE OF APPEAL INFORMATION**

**NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE TIMES ALLOWED  
FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS  
RESPONDENT**

A taxpayer has two options after receiving a Commission final decision:

***Option 1: PETITION FOR REHEARING BEFORE THE COMMISSION***

The taxpayer has a right to petition for a rehearing of a final decision within 20 days of the service of this decision, as provided in Wis. Stat. § 227.49. The 20-day period commences the day after personal service on the taxpayer or on the date the Commission issued its original decision to the taxpayer. The petition for rehearing should be filed with the Tax Appeals Commission and served upon the other party (which usually is the Department of Revenue). The Petition for Rehearing can be served either in-person, by USPS, or by courier; however, the filing must arrive at the Commission within the 20-day timeframe of the order to be accepted. Alternatively, the taxpayer can appeal this decision directly to circuit court through the filing of a petition for judicial review. It is not necessary to petition for a rehearing first.

**AND/OR**

***Option 2: PETITION FOR JUDICIAL REVIEW***

Wis. Stat. § 227.53 provides for judicial review of a final decision. Several points about starting a case:

1. The petition must be filed in the appropriate county circuit court and served upon the Tax Appeals Commission either in-person, by certified mail, or by courier, and served upon the other party (which usually is the Department of Revenue) within 30 days of this decision if there has been no petition for rehearing, or within 30 days of service of the order that decides a timely petition for rehearing.
2. If a party files a late petition for rehearing, the 30-day period for judicial review starts on the date the Commission issued its original decision to the taxpayer.
3. The 30-day period starts the day after personal service or the day we mail the decision.
4. The petition for judicial review should name the other party (which is usually the Department of Revenue) as the Respondent, but not the Commission, which is not a party.

For more information about the other requirements for commencing an appeal to the circuit court, you may wish to contact the clerk of the appropriate circuit court or the Wisconsin Statutes. The website for the courts is <http://wicourts.gov>.

This notice is part of the decision and incorporated therein.